



THE CITY OF
NOVATO
CALIFORNIA

September 15, 2011

75 Rowland Way #200
Novato, CA 94945-3232
415/899-8900
FAX 415/899-8213
www.cityofnovato.org

The Honorable Julius Genachowski
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

**RE: Acceleration of Broadband Deployment Expanding the Reach and
Reducing the Cost of Broadband Deployment by Improving Policies
Regarding Public Rights of Way and Wireless Facilities Siting (WC
Docket No. 11-59)**

Mayor

Madeline Kellner

Mayor Pro Tem

Denise Athas

Councilmembers

Carole Dillon-Knutson

Pat Eklund

Jeanne MacLeamy

City Manager

Michael S. Frank

Dear Chairman Genachowski:

On behalf of the residents of Novato, California, the City of Novato ("City") is filing a formal response to the Commission's Notice of Inquiry ("NOI"), released April 7, 2011, regarding the above entitled proceeding. Through these comments the City seeks to provide the Commission with basic information regarding its local right-of-way and facility management practices and charges¹ applied to wireless broadband facilities proposed in the public right-of-way. Likewise, the City would like to correct false and misleading statements presented to the Commission in comments filed by the PCIA – The Wireless Infrastructure Association, dated July 18, 2011.

The City has long been a proponent of providing Novato residents with access to leading edge information infrastructure, including wireless telecommunications and broadband networks. Indeed, the 1996 Novato General Plan² includes policy guidance and program direction to work with telecommunications companies to encourage state-of-the art telecommunications capabilities, including fiber optic, satellite, wireless, cable lines, and newly emerging technologies capable of transferring data digitally. The Novato General Plan also contains policies requiring new infrastructure, such as wireless broadband facilities, to be compatible with surrounding land uses and sensitive to Novato's environment and rural character. To balance these needs, the City has relied on its local land use authority to regulate the installation of wireless broadband facilities on a project specific basis recognizing the unique characteristics of each project site and surrounding pattern of development and land uses.

¹ The term "charges" is used to include both any cost recovery that is part of right-of-way and facility management (such as permitting fees), as well as other compensation (such as bonding for the removal of abandoned broadband facilities) received from communications companies consistent with state and local law.

² The Novato General Plan is a comprehensive, long-range plan that identifies the community's vision of the future of Novato in terms of broad goals, policies, and programs focusing on land use, transportation, environmental, economic, fiscal, and social issues.

With respect to wireless broadband facilities proposed within the public right-of-way, the City has only received one such request since the broad adoption of wireless technologies beginning in the late 1980's. This application was submitted by Extenet Systems, Inc. in early 2011. The City is currently reviewing Extenet Systems' request consistent with the City's wireless telecommunications ordinance and California state law, in particular, California Public Utilities Code §7901 and 7901.1, which in summary, mandates that local municipalities must allow state licensed public utility companies to access and place lines, poles, and other communications improvements in the public right-of-way; local municipalities may exercise reasonable control over the time, place, and manner in which the right-of-way may be accessed. Extenet Systems is licensed as a public utility by the California Public Utilities Commission. As such, the City has limited its review to identifying a wireless antenna design that is compatible with the rural and scenic qualities of the residential neighborhood within which Extenet Systems intends to place its wireless antennas. City staff has worked collaboratively with Extenet to arrive at a wireless facility design that satisfies the firm's technical requirements for delivering wireless broadband service and meets the City's desire for a wireless antenna design that is compatible with the surrounding rural environment and residential land uses.

The City's collaborative working relationship with Extenet Systems is emblematic of its dealings with other wireless infrastructure developers. Indeed, over the many years the City has been reviewing and processing use permit and design review applications for wireless telecommunications and broadband facilities on private lands, staff has not received feedback from wireless infrastructure developers indicating that local policies, application procedures, and charges have discouraged broadband deployment in Novato. Ironically, it is reported that upwards of ninety-six percent of residents in Marin County (within which the City of Novato is located), California, have access to broadband service³. Clearly this statistic is not indicative of obstructionist policies, application procedures, conditions of approval, and charges.

Given the City's responsible and timely handling of applications for wireless broadband facilities in general, it is particularly troubling to learn of the potential imposition of federal laws that would preempt state and local agency authority to regulate the deployment of such facilities in public rights-of-way. The approval of such statutory measures would potentially allow private wireless infrastructure providers unfettered access to the public right-of-way, undoing decades long efforts to minimize the intrusion of overhead utilities, stripping local agency oversight of the safety and condition of work performed within its public rights-of-way, eliminating public participation in matters potentially affecting quality of life and enjoyment of property, and leaving local agencies vulnerable to absorbing the financial costs of improperly conducted work within public rights-of-way and/or the removal and restoration of neglected or abandoned wireless broadband facilities due to financial failure or poor operating procedures of a wireless infrastructure provider.

³ United States Federal Communications Commission. National Broadband Plan, <http://www.broadband.gov/plan/3-current-state-of-the-ecosystem/> accessed August 29, 2011.

The City feels strongly that the regulation of wireless broadband facilities in the public right-of-way should remain a matter of local regulation and not that of federal law. The City recognizes, as should the Commission, that the matters of location, design, management, and maintenance of wireless broadband facilities in the public right-of-way are fact and site-specific issues, which turn on local engineering and design practices, local environmental and development conditions, local traffic and economic patterns, and aesthetic and quality of life concerns and circumstances. As such, these matters are best managed by local agency staff with considerable expertise in the disciplines of land use and engineering design applicable in the state, county, and local municipality they represent.

RESPONSE TO KEY ISSUES RAISED IN THE NOI

Based on the observations above, the City offers the following information in response to several key questions raised in the Commission's NOI:

I. *Application Procedures, Forms, Substantive Requirements, and Charges*

The Commission has asked whether all necessary application procedures, forms, substantive requirements, and charges are readily available.

The City has for many years posted all application forms, informational handouts, local zoning requirements, and charges applicable to the development of wireless broadband facilities in Novato on the city's website. Additionally, the City maintains a staff of professional civil engineers and urban planners with significant experience in state and local regulations applicable to wireless broadband facilities, who are regularly available by phone, email, walk-in public counter hours, and on an appointment basis to answer questions and provide guidance to wireless infrastructure providers.

II. *Sources of Delays*

The Commission asks what factors are chiefly responsible to the extent applicants are not processed in a timely fashion. The Commission also asks about errors or omissions in applications.

In Novato most applications for wireless telecommunications facilities are processed quickly through a public review process, often in as little as two-months. The speed with which an application is processed is directly dependent upon the quality of applicant's project submittal in terms of complete and accurate information regarding a proposal's location, design, appearance, and operating characteristics (e.g., radio frequency radiation report). Delays often occur when key pieces of information are missing from the application package or plan documents are of poor quality. Under such circumstances the City notifies the applicant of any omissions, errors, or other deficiencies as soon as possible, but in no case later than thirty-days following receipt of the application. Staff also advises applicants of potential project changes that are recommended to conform to local requirements or improve the wireless broadband facility to the benefit of public health, safety, and welfare.

The duration of the permitting phase is also tied to the responsiveness of the applicant. In several instances the City has notified a wireless infrastructure provider of a plan deficiency or omission only to have several months pass before receiving a response or updated information. This type of delay, beyond the control of the City, is often attributed to the work load and availability of the wireless infrastructure provider's third-party design consultants (e.g., radio frequency engineers, civil engineers, and planning representatives) and/or its own corporate structure that may require authorization at many levels before providing a response to the City.

III. *Permitting Charges*

The Commission seeks data "on current permitting charges, including all recurring and non-recurring charges, as well as any application, administrative, or processing fees." The Commission further asks whether such charges are related to impacts on the local community, such as pavement restoration costs for projects that involve trenching in roadways.

The City, having only received one request for a wireless telecommunications facility as of early 2011, does not have established charges for use of the public right-of-way. Generally, fees are not charged of state recognized public utilities, such as those providing natural gas or electric power services, for use of the public right-of-way. However, the City does charge a fee on applications for encroachment permits. Charges for encroachment permits are based on a percentage of the estimated cost of the work being done in the public right-of-way. This charge is intended to cover the cost of City staff time to prepare the permit documents and inspect the work of the wireless infrastructure provider to insure that the right-of-way is accessed in a safe manner and is properly repaired once work is completed. This particular charge is important to supporting staff efforts to avoid unsafe working conditions in the right-of-way and prevent the City from bearing the costs of repairing damaged infrastructure.

The City may append an encroachment permit with a license agreement setting forth the maintenance expectations of the applicant and provisions to address instances where a facility is neglected or is abandoned, such as the posting of bond or other surety for maintenance or removal. The City believes it is important to protect its interests and those of the public with respect to potential for private wireless infrastructure providers to neglect wireless installations or suffer financial failure. This position is lawful and reasonable considering the City was party to past situation where a company known as Metricom was permitted to place its radio units on light-poles managed by the Marin General Services Administration (County of Marin, California), a joint-powers authority of which the City of Novato is a member. Metricom subsequently filed for bankruptcy and abandoned its installations on MGSA's light-poles, which continued to draw power from Pacific Gas and Electric Company (PG&E). PG&E later demanded the units be removed from the MGSA's light-poles due to unpaid electric power charges. The MGSA and its member agencies absorbed tens of thousands of dollars in costs to remove over two-hundred of Metricom's wireless radios.

The City also charges for the processing of development entitlements (e.g., design review) for new wireless broadband facilities. The City operates on a cost recovery system whereby a wireless infrastructure provider is required to post a deposit with the city against which staff time and materials would be charged. The City sets its minimum deposits at a level that is intended to cover likely staff time and materials necessary to process a normal application request. These deposits range from approximately \$2,600 to \$5,500 depending upon the necessary entitlements. If the full cost recovery deposit is not used the remaining balance is refunded to the applicant. However, if a project becomes controversial, requiring significant public and applicant contacts, or is the subject of an appeal, an applicant may incur charges at the assigned staff member's billing rate for any amount over the minimum deposit.

IV. *Local Policy Objectives*

The Commission asks what "policy goals and other objectives" underlie the local practices and charges in this area.

The City's policies are designed to achieve a balance between the need and demand for wireless telecommunications and broadband services, maintaining the public health, safety and welfare, and preserving Novato's rural and scenic qualities. In more specific terms, the City's policies accomplish the following with respect to the public right-of-way: facilitate the responsible deployment of broadband services; make the services broadly available; ensure public safety; avoid traffic disruption; maintain and repair roadways; prevent public disruption and damage to abutting property; minimize accelerated deterioration to roads that accompanies street cuts; satisfy aesthetic, environmental, or historic preservation concerns; and avoid damage to the property of others. Local policies and application process are intended to consider the deployment of wireless broadband facilities on a site specific basis recognizing the unique characteristics of each proposal's location, setting, and surrounding pattern of development.

PCIA - THE WIRELESS INFRASTRUCTURE ASSOCIATION AND DAS FORUM

On July 18, 2011, the Commission received a filing from PCIA – The Wireless Infrastructure Association and The DAS Forum (a membership section of PCIA) regarding the matter of wireless broadband facilities in public rights-of-way. The PCIA's comments set forth this special interest group's position relative to the need for comprehensive federal legislation favorable to private wireless infrastructure providers. To support its position the PCIA prepared several exhibits identifying agencies it believes to obstruct the deployment of wireless broadband facilities in public rights-of-way. The City of Novato was identified in Exhibit B of the PCIA's filing as being one of numerous jurisdictions "that retain consultants identified by the wireless infrastructure industry as obstructionists and problematic." This assertion, as with much of the PCIA's comments, is false with respect to the City. The City does not hire outside consultants to process any of its applications for wireless telecommunications and broadband facilities. As such, the City finds the PCIA's filing as deceptive and insulting to the Commission's fact finding process. Accordingly, the Commission should dismiss the PCIA's comments.

CONCLUSION

The City of Novato appreciates the Commission's review of the matter of the deployment of wireless telecommunications and broadband facilities in public rights-of-way and the opportunity for the City comment thereon. The City recognizes the importance of providing access to wireless broadband services to the nation's competitiveness in the global economy and convenience of the public. However, the deployment of wireless broadband facilities in public rights-of-way cannot come at the expense of local agencies and the public. As such, the City encourages the Commission to conclude that the regulation of wireless broadband facilities in public rights-of-way remains a matter best regulated by local agencies and not federal law. As discussed above, local governmental agencies are best suited to review and regulate wireless broadband facilities given that the matters of location, design, management and maintenance of such facilities in the public right-of-way are fact and site-specific issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael S. Frank", with a long horizontal flourish extending to the right.

Michael S. Frank
City Manager

cc: Hon. Senator Diane Feinstein
Hon. Senator Barbara Boxer
Hon. Congresswoman Lynn Woolsey
Novato City Council
Marin Telecommunications Agency
National League of Cities
California League of Cities